

by the account, that no portion of the claims secured by the mortgage, was due when the bill was filed, the suit can be maintained. The rule appears to be well settled, that if a portion only of the mortgage debt is due at the time of the decree, the court will not permit the sale to proceed, if the mortgagor, or party holding the equity of redemption, comes before the sale and brings in the amount due, with interest and costs, and then the decree is allowed to stand, to enforce payment of the remaining debt, with interest, as it becomes due. *Campbell vs. Macomb*, 4 *Johns. Ch. Rep.*, 534. The matter here to be ascertained, is, whether any portion of this mortgage debt was due, when the bill was filed, and whether, if it should turn out upon the account, that none was due, this court can entertain the bill, because the maturity of the other notes, secured by the mortgage, shows that something is due at the time the court is called upon to pass a decree.

The answer of objects that the complainants can have no decree, unless Francis Feelemyer, who holds a prior mortgage upon a part of the property included in the mortgage to the complainants, is made a party, and this raises a question which may not be free from difficulty. The general rule certainly is, that all incumbrancers shall be made parties, whether prior or subsequent, and though cases may be found, where it has been held, that a prior mortgagee need not be made a party, because his rights are paramount, it would not be safe in the face of opposing authorities, of the highest respectability, to say, that such is the established law of this court. *Vide Story's Eq. Pl.* § 177, 178, and *note 2*, to the latter page, where the cases are collected.

I am not aware of any case decided by the Court of Appeals of this state, in which it has been held, that either a subsequent or prior mortgagee, *whose debt is due*, need not be brought before the court. If the debt of the absent mortgagee is not due, his presence as a party may, perhaps, be dispensed with, because you cannot force him to take his money before it is due. He may prefer to leave it out upon the security of the mortgage, and if he does so, I do not know that there is any authority in